Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 5, 2003

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39 pp

QUESTIONS PRESENTED

1. Whether, contrary to the law in other circuits, a court may find that the state action doctrine is inapplicable as a defense to an antitrust claim where (i) the claim was based on contracts made by a defendant while it held a statutory monopoly, and (ii) the state regulatory agency with plenary authority over the transition to competition specifically refused, in its transition rulemaking, to abrogate those monopoly-era contracts.

2. Whether, contrary to the law in other circuits, a court may allow the recovery of treble damages based on a defendant's assumed continuation of antitrust violations into the future, where an injunction or the defendant's voluntary actions could prevent any such future violations and fully restore competitive conditions to the allegedly monopolized market.

3. Whether by limiting the definition of the "relevant market" as a matter of law to inputs at the upstream level of distribution, a court can relieve a plaintiff of the burden of proving harm to competition in the downstream market for consumers, where the only competition for sales occurred and plaintiffs' only claims for damages arose.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following parties are respondents in this proceeding:

Advanced Communications, Inc.
Coinlink, L.L.C.
Jack Keeler, d/b/a Americall
Kenneth Meritt, d/b/a Oklahoma Heartland Payphone Services
Don Owens, d/b/a Owens Communications Co.
Payphone Plus, L.L.C.
Redlands Communications, Inc.
Sooner Telecommunications, Inc.

Petitioner is a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION 11

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS BY ALLOWING A FEDERAL JURY TO OVERRIDE STATE REGULATORY DECISIONS REGARDING COMPETITION POLICY 11

A. Clearly Articulated State Policy 12

B. Active Supervision by the State 17

II. THE DECISION ALLOWING DAMAGES FOR AVOIDABLE FUTURE MISCONDUCT CONFLICTS WITH DECISIONS OF AT LEAST THREE CIRCUITS 20

III. BY UPHOLDING LIABILITY AND DAMAGES FOR COMPETITOR CONDUCT THAT DID NOT INJURE COMPETITION IN THE CONSUMER MARKET, THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS THAT REQUIRE PROOF OF ANTITRUST INJURY IN THE MARKET WHERE THE PLAINTIFF COMPETES FOR SALES AND CLAIMS DAMAGES 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216 (2d Cir. 1999) 25

Addamax Corp. v. Open Software Foundation Inc., 888 F. Supp. 274 (D. Mass. 1995) 28

Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys., 155 F.3d 59 (2d Cir. 1998) 12, 16

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) 22

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 27

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 5

Brown v. ProFootball, Inc., 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996) 27

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 5, 24

Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261 (7th Cir. 1984) 26

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 12

Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986) 16

Connecticut Import. Co. v. Frankfort Distilleries, Inc., 101 F.2d 79 (2d Cir. 1939) 21

E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296 (10th Cir. 1975) 26-27

Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992) 26, 29

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957) 21

Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999) 27

Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989) ... 13, 17

Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984) 13, 17

Intergraph Corp. v. Intel Corp. 195 F. 3d 1346 (Fed. Cir. 1999) 25

Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194 (W.D.N.Y. 1995) 28

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 27

Merrill Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) 4

Momand v. Universal Film Exchange, Inc., 43 F. Supp. 996 (D. Mass. 1942). 21-22

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) 5

Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d 441 (7th Cir. 1984). 21

Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997) 22, 25

Paddock Publ., Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1997) 22

Patrick v. Burget, 486 U.S. 94 (1988) 18

Reazin v. Blue Cross, 899 F.2d 951 (10th Cir. 1990) 27

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 26

Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984) 25

Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987) 25

Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985) 12

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) 5, 26

TEC Cogeneration Inc. v. Florida Power & Light Co., 76 F.3d 1560 (11th Cir. 1996) 19

Telecor Communications, Inc. v. Southwestern Bell Telephone Co., 305 F.3d 1124 (10th Cir. 2002) ..... *passim*

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) 3

Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001) 27

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 12-13

United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) 26

United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) 2

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2000) 24

Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 22 F.3d 1260 (3d Cir. 1994) 12-13, 16

STATUTES

15 U.S.C. § 2 5

15 U.S.C. § 15(a) 20

15 U.S.C. § 26 20

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331 9

28 U.S.C. §§ 1367 9

47 U.S.C. § 276(b)(1) 7

47 U.S.C. § 276(b)(3) 7

Okla. Stat. tit. 17, § 139.1 7

Okla. Stat. tit. 79, § 203 3

Okla. Stat. tit. 79, § 212 3

CONSTITUTIONAL PROVISIONS

Okla. Const. art. IX, § 18 16

Okla. Const. art. IX, § 20 16

OTHER AUTHORITIES

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunciations Act of 1996, Report and Order, 11 F.C.C.R. 20541 (Sept. 20, 1996). 27

PETITION FOR A WRIT OF CERTIORARI

Petitioner Southwestern Bell Telephone Company ("SWBT") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 305 F.3d 1124 (10th Cir. 2002) and appears at 1a.[1] The order denying the petition for rehearing and rehearing en banc, over the dissenting votes of Judges Kelly and Hartz, appears at 84a, and is not reported. The district court's order granting respondents' motion for summary judgment on the issue of market definition appears at 50a. A related order precluding petitioner's expert testimony on market definition appears at 65a. The district court's order denying petitioner's motion for a new trial on damages appears at 70a. The district court's post-trial order on the issue of state action appears at 70a. None of the district court's orders is reported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on September 10, 2002. Petitioner's timely petition for rehearing and rehearing en banc was denied on November 12, 2002.

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1 References to the Appendix to this Petition are in the form "1a." References to the record before the court of appeals are in the form "SWBT-App. __."

CONSTITUTIONAL AND STATUTORY PROVISIONS[2]

15 U.S.C. §§ 2, 15(a), 26

47 U.S.C. §§ 276(b)(1), (3)

Okla. Const. art. IX, §§ 18-22, 24-25, 34

Okla. Stat. tit. 17, § 139.1

Okla. Stat. tit. 79, § 203

Okla. Stat. tit. 79, § 212

INTRODUCTION

This antitrust case arises in the context of Oklahoma's transition from an era in which pay telephone services were provided by regulated utilities operating under exclusive franchises to an era of open, albeit regulated, competition. As payphone competition began, petitioner Southwestern Bell Telephone Company ("SWBT"),[3] a former exclusive franchisee, had a large percentage of payphone locations under multi-year contracts. Until they expired, as many did annually, those contracts allegedly slowed the pace at which new payphone providers could obtain locations to place their phones. Plaintiffs-respondents are independent payphone service providers ("PSPs") who claimed that such contracts impeded their market entry. Over Judge Kelly's forceful dissent, the court of appeals panel sustained a $22 million antitrust treble damage award.

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2 The provisions listed below are set out in full in the Appendix to this Petition at 86-103a.

3 SWBT was one of the regional Bell telephone companies that were part of AT&T prior to its divestiture in 1982. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). SWBT historically provided local telephone service in parts of Oklahoma, Arkansas, Kansas, Missouri and Texas.

In sustaining the verdict, the court of appeals held that: (i) the state action doctrine did not bar predicating antitrust liability on contracts made by SWBT while it was the exclusive franchisee, even though the state agency responsible for regulating the transition from monopoly to competition rejected the state attorney general's petition (supported by SWBT's competitors) to abrogate those pre-competition contracts; (ii) a jury could award damages for assumed future enforcement of SWBT's contracts, notwithstanding that any offending provisions were abatable by SWBT's voluntary actions or by injunction; and (iii) the relevant market should be defined exclusively at the upstream level of locations where payphones are placed, rather than at the consumer level which was the *only* source of plaintiffs' sales, revenues and claimed damages.

These rulings conflict with decisions in other circuits and raise questions of exceptional national significance. Although the verdict was rendered under state antitrust law, Okla. Stat. tit. 79, § 203 (102a), Oklahoma's antitrust statute provides that it "shall be interpreted in a manner consistent with federal antitrust law, 15 U.S.C. § 1 et seq., and the case law applicable thereto." Okla. Stat. tit. 79, § 212 (103a). Consequently, the court of appeals's opinion addresses only federal law. Because it establishes federal precedent that conflicts with the law in several other circuits on important and recurring issues, review by this Court is warranted.[4]

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4 This Court may review the Tenth Circuit's ruling to correct its erroneous construction of federal law. *See Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 152 (1984) (collecting cases where the Court "has reviewed the federal question on which the state-law determination appear[ed] to have been premised" and describing the practice of vacating lower court decisions "so that the [lower] court may reconsider the state-law question free of misapprehensions about the scope of federal

(continued....)

A. State Action. The state action doctrine ensures that statutes aimed at preventing private restraints, like the Sherman Act and the Oklahoma antitrust law, are not used to interfere with state regulatory decisions. The doctrine's deference to state regulatory policy reflects both the intended limits of the antitrust laws and the imperatives of federalism and state sovereignty. The decision below flouts these essential limitations on judicial power.

The Oklahoma Corporation Commission ("OCC") had plenary authority over SWBT's payphone contracts, and was responsible for regulating the transition from monopoly to competition. In exercising that authority, the OCC rejected proposals to speed competitive entry by abrogating SWBT's monopoly-era contracts. Notwithstanding the OCC's plenary authority over, and actual supervision of, those contracts – thereby fulfilling state action requirements – the courts below approved their use as "fair game" for a jury to find SWBT guilty of monopolization from the very first day competition began. This decision cripples the state action doctrine, is in conflict with other circuits, and invites collateral attacks on *actual* agency determinations, thereby encouraging states to slow, halt or encumber deregulatory initiatives.

B. Future Damages. Damages based on assumed future misconduct are impermissible. This is the law in at least three circuits. The Tenth Circuit, however, allowed future damages, even though by voluntary action or court order SWBT's contracts could be made terminable upon short notice and without penalty – and thus presumptively

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(continued) . . .

law"); *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 816 (1986) ("Court retains power to review the decision of a federal issue in a state cause of action").

lawful. By blessing plaintiffs' choice of future damages over injunctive relief, the decision below allows damages based on speculative loss of customers for whose business, post-verdict, plaintiffs would otherwise have had to compete. It thereby fails to restore competition, while giving plaintiffs a windfall.

C. **Market Definition**. The overriding purpose of the antitrust laws is to protect consumer welfare. Competitors must establish injury to the competitive process itself, not just a decline in their own fortunes. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (Sherman Act is a "consumer welfare prescription"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws for "'the protection of competition, not competitors'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The corollary principles are: (i) where the alleged source of competitive harm is single-firm monopolization, 15 U.S.C. § 2, proof of monopoly power in a properly defined relevant market is indispensable, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 457 (1993); and (ii) absent proof of antitrust injury in the market where a competitor claims damages, the antitrust laws do not afford a damage remedy. *See Brunswick Corp.*, 429 U.S. at 489.

This Court has never held in a monopolization case that a competitor could recover antitrust damages for lost sales in a downstream end-user market absent proof of consumer injury. Under the decision below, however, a competitor for consumer sales can entirely avoid the burden of proving market definition, monopoly power and antitrust injury *with respect to end-users* simply by pleading that the relevant market is limited to inputs needed for those downstream sales. The decision is thus likely to foster significant confusion and circuit conflict – with potentially harmful results in numerous industries subject to intense

downstream inter-product competition, but dependent in part on upstream inputs.

STATEMENT OF THE CASE

A. The Payphone Business

Like many other aspects of telecommunications, competition in the payphone business began in the mid-1980s after the breakup of AT&T. At the option of individual states, payphones could be installed by persons who were not franchised local exchange carriers ("LECs"). Thousands of entrepreneurs, ranging from individuals and small businesses to major long-distance carriers and phone companies operating outside their LEC territories, entered the payphone business in the ensuing decade.

Operators of payphones make money principally from charges paid by consumers to use the phone service. Accordingly, the most desirable payphone locations are those accessible to heavy public traffic. To provide services to the public, payphone providers have to contract with property owners to obtain the right to place phones at their locations. Contracts typically run for multi-year terms and pay the location owner a percentage of revenues earned by the phone.

Over the past decade, the explosion of cellphone usage has devastated the payphone business. With cellphone prices declining and usage ubiquitous, consumer demand for payphones has collapsed. Banks of airport payphones stand idle as consumers talk on their cellphones, as do truck drivers, restaurant and bar patrons and teenagers on street corners.

B. The Regulatory Context

The State of Oklahoma historically granted exclusive franchises for all telephone services, including payphones. The exclusive franchises were regulated, in pervasive public

utility fashion, by the OCC, acting under authority granted directly by the Oklahoma Constitution. *See* Okla. Const. art. IX, §§ 18-22, 24-25, 34 (91a).

The OCC first considered opening payphones to competition in 1985. In deciding that continued exclusive franchises were in the public interest, the OCC applied classic regulatory principles, finding that competition would lead to cherry-picking by new entrants, leaving incumbents with "low or no profit locations" and thwarting Oklahoma's commitment to universal service. (119a). In 1990, the Oklahoma Legislature expressly authorized the provision of payphone service by persons other than franchised telephone companies, Okla. Stat. tit. 17, § 139.1, but "entrusted the implementation of that transition" to the OCC. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1128 (10th Cir. 2002) (2a). The OCC limited such service to franchised utilities for another six years.

With the Telecommunications Act of 1996, 47 U.S.C. § 276 *et seq.*, Congress sought, *inter alia*, "to promote competition among payphone service providers," and effectively required all states to allow payphone competition. *See* 47 U.S.C. § 276(b)(1) (89a). Congress directed the FCC to regulate certain details of this national transition, while leaving other aspects to state regulation. Congress also provided that existing contracts with location owners for payphone sites were *not affected* by the legislation. *See* 47 U.S.C. § 276(b)(3) (90a).

At the state level, the OCC initiated a rulemaking docket to adopt rules for the transition in Oklahoma to a regime of regulated competition. (131a). There was a full-scale state administrative proceeding, including public hearings and written submissions from numerous participants, including the Oklahoma Attorney General, SWBT and potential new entrants. (151-55a).

At the conclusion of a four-month proceeding, the OCC issued comprehensive rules that authorized entry of new payphone providers while maintaining regulatory control. The OCC rulemaking included thorough evaluation of a proposal made by the Attorney General (called the "fresh look"), which would have given location owners a 90-day window to terminate existing payphone contracts without penalty and accept offers from new entrants. (154-55a). The OCC declined to adopt the proposal, but invited "the industry" to raise the issue again if there was "an interest or need to do so." (Id.). Thus, as contemplated by the OCC, SWBT entered the competitive era with its existing contracts in place and with competition focused on locations as each contract expired, as well as on new locations.

C. Plaintiffs' Claims

Although plaintiffs successfully competed in the payphone business - even after some entered on a virtual shoestring - they claimed that SWBT violated the Sherman Act, 15 U.S.C. § 1 *et seq.*, and state antitrust law by preventing them from gaining an even larger share. Their principal theory was a reprise of the contentions before the OCC that SWBT's monopoly-era contracts "locked up" location owners before competition began. According to plaintiffs, SWBT's carryover contracts made it an unlawful monopolist from day one of competition. *See* SWBT-App. 8386 (SWBT "begins with a 100% market share").

SWBT's contracts were virtually identical to the contracts used by plaintiffs. Nonetheless, under plaintiffs' theory, SWBT's large market share (derivative of prior state policy) barred it from using the same competitive tools. (SWBT-App. 8386). Plaintiffs also complained that SWBT impeded location owners from switching payphone providers by creating a bureaucratic "maze" for processing such requests, and that SWBT used "dirty tricks" in

removing its equipment to make it more costly for competitors to take over payphone locations.

D. District Court Proceedings

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367. Plaintiffs moved for partial summary judgment on the issue of market definition. They asked the district court to define the relevant market as "the provision of public pay phones and related services to pay phone location owners." (51a). SWBT urged that the market was the provision of phone service to consumers who were "in transit" (*i.e.*, away from home or office), and thus included both payphones and cellphones. (51a). The court found that "[b]oth sides have presented an enormous amount of evidence, a review of which shows that they *hotly contest* the factual issues." (53a) (emphasis added).

Instead of denying summary judgment, however, the court went on to weigh the evidence using its "common sense," and rejected the opinions of SWBT's economic expert as "unreasonable" (60a). In granting plaintiffs' motion, it held that the "provision of public pay phones and related pay phone services" was the market. (61a). The district court also granted plaintiffs' *in limine* motion to exclude the opinions of defendant's experts "on cell phones and the effect of cell phones on the 'end users,'" holding that "[t]he relevant market has been defined to exclude cell phones." (66a).

The district court also denied SWBT's motion *in limine* under the state action doctrine to exclude evidence concerning contracts predating the commencement of competition in November 1996 – the monopoly-era contracts that had been the subject of the "fresh look" proceeding. (67-68a). It denied post-trial motions directed to this issue as well. (77a).

With respect to damages, the court denied SWBT's motion during trial to strike plaintiffs' claim for future damages arising from the assumed future enforcement of contracts already in existence. After the verdict, when SWBT argued that plaintiffs' claim for injunctive relief vitiated the future damages award, plaintiffs withdrew their demand for an injunction. The court then sustained the award of future damages. (70a).

E. The Tenth Circuit's Decision

A divided panel of the court of appeals affirmed on all issues, basing its decision entirely on federal law precedent. On market definition, the panel first unanimously rejected the district court's improper fact finding that cellphones and payphones were not sufficiently interchangeable to be part of the same market. (9-10a). Although the majority recognized that the jury could well have based its verdict on an assessment of the consumer market (5a), and that such assessment necessarily would be impaired by the improper exclusion of evidence of cellphone competition, it failed to reverse.

Instead, the majority affirmed on an alternative ground that "[l]ocation owners are the relevant customers" (18a), even though locations are merely distribution inputs used for sales to end-users. The majority's sole rationale for adopting this market definition was that the location-owner level was "where the Plaintiffs argued that Southwestern Bell has monopolized competition" (11a). Relying on cases brought by persons who were forced to sell at artificially low prices to monopsonies, the court of appeals fashioned an unprecedented rule that allows plaintiffs who suffer damages only from lost consumer sales to recover based solely on a competitor's alleged control over a distribution input, even where the consumer market is highly competitive.

The dissent saw the majority's "holding that end-users of phone services do not matter as in considerable tension with the Supreme Court's holdings" (38a), and as not required by the monopsony cases (41a). Rather, "the evidence plainly present[ed] a sufficient disagreement to require submission to a jury." (Id.).

The court of appeals rejected application of the state action doctrine because "no state policy expressly permitted [SWBT] to attempt to lock up customers contractually" (25a) and because the OCC did not actively supervise SWBT's contracting practices (25-26a). The dissent disagreed, finding that the "OCC determined how and when competition could begin [in Oklahoma]," and that the OCC rulemaking constituted active supervision. (44a).

Finally, the court affirmed the award of future damages. The majority reasoned that since SWBT had not offered to cease enforcing its contracts, "the district court was not obligated to assume that [SWBT] would voluntarily terminate its contracts with location owners." (34a). The dissent again disagreed, finding it inconsistent with antitrust principles to allow future damages for enjoinable conduct. (47-48a).

SWBT's petition for rehearing en banc was denied (with one judge recused) over the votes of Judges Kelly and Hartz.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS BY ALLOWING A FEDERAL JURY TO OVERRIDE STATE REGULATORY DECISIONS REGARDING COMPETITION POLICY

The state action doctrine embodies the fundamental policy that antitrust laws written to prohibit private restraints of trade should not be read to outlaw public restraints, particularly in light of fundamental principles of

federalism and state sovereignty. *See, e.g., Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Where a State has elected to subordinate competition to regulation, antitrust law must defer to that authority.

Although the basic contours of the state action doctrine are established, the lower courts have continued to struggle with its application. The transition from state-sanctioned monopoly to regulated competition has been particularly vexing. The decision below brings into sharp focus circuit conflicts in this context that require this Court's intervention.

A. Clearly Articulated State Policy

The court of appeals rejected SWBT's state action defense because, it said, "no state policy expressly permitted [SWBT] to attempt to lock up customers contractually long beyond the November 1996 introduction of competition in an effort to stymie that competition." (25a). On this basis, plaintiffs were allowed to make SWBT's location-owner contracts the centerpiece of their monopolization claim.[5] This holding – that the state action doctrine applied only if the State "expressly permitted" the challenged conduct – is flatly inconsistent with the doctrine's interpretation in at least three circuits[6] and in this Court. *See Town of Hallie v.*

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5 Plaintiffs' theory of liability focused on contracts pre-dating November 1996. In closing, they argued such contracts "locked up the market before competition opened up" (SWBT-App. 8397-98), and were a "wall that would prohibit people from coming into the market" (SWBT-App. 8374).

6 *See, e.g., Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys.*, 155 F.3d 59, 69 (2d Cir. 1998) ("the 'clear articulation' label . . . has always been construed as synonymous with the foreseeability test"); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267 (3d Cir.

(continued....)

City of Eau Claire, 471 U.S. 34, 42 (1985) (authorization exists where "anticompetitive effects logically would result from . . . broad authority to regulate").

This case is the paradigm of a deregulatory transition, where new competitors blame the former statutory monopolist for business difficulties arising from the State's regulatory determinations. In such a context, it is almost inevitable that regulatory decisions will foreseeably create some obstacles for new entrants - obstacles that could be labeled "anticompetitive" in a later jury trial. Unless the State regulates to the contrary, the former exclusive franchisee necessarily will enter the competitive era with the various advantages arising from the legacy of state-sanctioned monopoly. For example, the former exclusive franchisee will likely enter the new competitive era with a 100% market share. It will benefit from time-honed business practices, contacts and know-how about the best routes, suppliers, locations, customers, and equipment. Similarly, it will have contracts in place with suppliers of inputs and with customers - contracts made while it enjoyed the advantages of its monopoly, presumably on terms that

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(continued) . . .

1994) ("to satisfy the clear articulation requirement, a defendant need only show that the 'legislature contemplated the kind of action complained of'") (quoting *Hallie*, 471 U.S. at 44); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1457 (9th Cir. 1989) ("The legislature need not detail or compel the specific anti-competitive actions at issue, nor need it explicitly state that it expects the regulated party 'to engage in conduct that would have anticompetitive effects. Likewise, the legislature need not expressly *permit* the challenged conduct'") (quoting *Hallie*, 471 U.S. at 42) (internal citation omitted); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949, 960-61 (6th Cir. 1984) (restraint need only be "reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation").

reflect that monopoly position and, as here, were subject to regulatory oversight.

The State, which holds plenary authority over the statutory monopolist, is faced with making difficult policy and economic judgments. The State may place restrictions on the franchisee in the period leading up to competition or require that the franchisee share accumulated advantages with new entrants. The State may also decide to ease the burden of transition in recognition of the franchisee's continuing "public service" obligations, for example, to provide payphones at unremunerative locations, which new entrants can ignore. What is certain, however, is that the State necessarily makes a determination – whether through its legislature or a regulatory agency – about the terms on which the exclusive franchisee shall operate in the period prior to, and at the outset of, competition. That sovereign decision is made knowing that it will substantially impact the fortunes of new entrants.

That is what occurred here. As part of its rulemaking on the transition, the OCC considered proposed "safeguards . . . to protect the interest of competitive payphone service providers." (132a). The Oklahoma Attorney General argued that location owners should be given the option to cancel their contracts with incumbent LECs such as SWBT and sign up with a new entrant:

> Incumbent LECs in Oklahoma have literally had decades to identify the most lucrative payphone sites in their territories. They have also now had several months "head start" to renegotiate contracts with these site owners in an effort to "lock" them in and make it more difficult for new competitors to negotiate agreements for these sites. . . . Existing contracts between incumbent LECs and payphone site owners are a significant, perhaps insurmountable entry barrier to competitive

> payphone providers. Allowing all site owners the option of renegotiating these contracts . . . will eliminate this barrier.

Brief of the Oklahoma Attorney General on the Commission's Authority to Allow for the Renegotiation of Existing Contracts at 5, 10 (SWBT-App. 3733, 3738). Potential new entrants complained that SWBT's contracts "hinder[ed] competition" (45a) (dissent), and endorsed the Attorney General's position. SWBT (and others, including some new competitors) opposed it.

Thus, the very arguments presented by the plaintiffs as the foundation for antitrust liability in this case were rejected by the OCC after careful consideration:

> The final issue, which received much attention and oral and written comment, was the Attorney General's proposal to create a rule which would provide a 90-day window of opportunity for payphone site-owners to take "a second look" at their preexisting contracts with the incumbent LECs, and decide whether or not to remain bound by said agreements or to terminate them without penalty, and renegotiate with a new competitor for more favorable terms. . . . After reasonable deliberation and consideration of the issue, the Commission voted not to entertain such a rule at this time, but rather suggested its willingness to entertain further discussion and investigation into the matter, should the industry indicate an interest or need to do so.

(154-55a).

The dissent below was thus correct that "not until the OCC determined how and when competition could begin did Oklahoma change its policy" of subordinating competition to regulation. (44a). Unquestionably, the OCC's plenary authority under the Oklahoma Constitution

and the 1990 legislation to determine "how and when" to alter SWBT's monopoly, included authority over its contracts.[7] It is difficult to imagine a clearer example of the foreseeable competitive consequences of state policy than the OCC's decision to leave the monopoly-era contracts of a regulated utility in place and to retain jurisdiction to consider the future impact of SWBT's contracts.

Given this context, a circuit conflict arises because the proper inquiry is not whether the state "expressly permitted" SWBT to make contracts to "stymie . . . competition" (25a), but rather, as the Second Circuit holds, "'whether the legislature could foresee the anticompetitive effects that would follow from the express authority the state had delegated.'" *Automated Salvage Transport, Inc. v. Wheelabrator Environ. Sys.*, 155 F.3d 59, 69 (2d Cir. 1998) (quoting *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032, 1042 (2d Cir. 1986)). Similarly, the Tenth Circuit's requirement of "express permission" flatly conflicts with the Third Circuit standard: "State approval of [the statutory monopolist's] activity is not required for immunity to attach"; the question is whether the challenged conduct "is reasonably foreseeable." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267-68 (3d Cir. 1994).

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7 The Oklahoma Constitution (not mere legislative delegation) grants the OCC "the power ... of supervising, regulating and controlling all ... [telephone] companies ... in all matters relating to the performance of their public duties ... and of correcting abuses ... by such companies...." Okla. Const. art. IX, § 18 (91-93a). If any interested person (including SWBT's competitors) believed the OCC had not followed the mandate of the 1990 legislation, they had a constitutional right, under Okla. Const. art. IX, § 20 (94-96a), to appeal to the State Supreme Court. (46a) (dissent).

That it was State policy to bring "competition to the payphone market," as the panel majority noted (25a), does not change the fact that the legislature delegated both the timing and manner of the transition to the OCC. The Tenth Circuit's failure to recognize the significance of the OCC's plenary transition authority conflicts with the careful analysis undertaken by other circuits when faced with similar legislatively-mandated transitions. For example, in *Hass v. Oregon State Bar*, 883 F.2d 1453, 1458 (9th Cir. 1989), the Ninth Circuit held that the "clear articulation" requirement was met where the state left to the agency the task of selecting the course of action best suited to accomplishing legislative policy. Similarly, the Sixth Circuit observed:

> An agency vested with broad discretionary powers will rarely find that only one course of action is available to accomplish its mission.... Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated power within the scope of an agency's authority.

Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 960 (6th Cir. 1984). The court below, however, adopted a rule that dispenses with the foreseeability inquiry altogether, since it was clearly foreseeable that the OCC, in its delegated implementation of payphone deregulation, might choose from a wide array of options affecting the transition, including to allow existing contracts to stand.

B. Active Supervision by the State

The Tenth Circuit's interpretation of the second prong of the state action test – active supervision – also conflicts with other circuits as it intrudes into Oklahoma's exercise of sovereign powers. After what the OCC described as "much attention and oral and written comment" on the effect of

SWBT's contracts on competition, the OCC determined not to alter them – but stated that it would be willing to do so in the future. (154-55a). This is *actual* supervision, involving a full-scale hearing addressed to the very issue later raised in federal court. *Actual* supervision is, by definition, *active* supervision. As the dissent recognized, the OCC's "ultimate control over SWBT's alleged anti-competitive conduct" (44a) meets this standard.

By holding that "ultimate control" did not exist because the "state likely was not even aware of the full extent of Southwestern Bell's lock up conduct" (25a), the court of appeals compounded its affront to state sovereignty by challenging the competence of the OCC's decisional process. The state action doctrine does not authorize a federal court to second-guess a state agency's fact-finding; the doctrine's very premise is deference to the State.[8] It is precisely to avoid a federal court's substitution of its subjective judgment for the decision of the responsible state agency that this Court adopted an objective standard for "active supervision." *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

The Tenth Circuit's "speculation," as the dissent put it (46a), about what the OCC "likely" knew revolves entirely around SWBT's answer to a single OCC interrogatory in which SWBT *truthfully* (as expressly found by the district court) disclaimed that it was seeking to enter into contracts with *all* of its location owners.[9] Moreover, the totality of OCC submissions specifically apprised the Commission of

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8 The availability of an appeal to the Oklahoma Supreme Court of an OCC rule based on inadequate fact-finding underscores the need for federal court deference. (46a) (dissent).

9 The district court found that SWBT's interrogatory answer "may not have been complete" but that it was not a "misrepresentation" and was "truthful." (SWBT-App. 4686-88).

this contracting activity, the contracts themselves and their likely effect on competitive entry.[10] Even if the state agency's fact-finding were incomplete – or wrong – a federal court is not empowered to substitute its own view of the "proper" regulatory approach.

The conclusion that there was no "active supervision" here because of the state's incomplete knowledge conflicts with the holding of the Eleventh Circuit that such awareness is unnecessary. Thus, *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1569-70 (11th Cir. 1996), held that conduct by Florida Power & Light ("FPL") was actively supervised by the state Public Service Commission ("PSC"), even though the PSC "was not given the opportunity to exercise its power to review FPL's conduct" because no one complained about it. It was enough that "the doors to the PSC were open to all with standing to complain. Being met with a complaint, the PSC had the full power to actively supervise." *Id.* at 1570. A clear conflict exists, since the Tenth Circuit denied immunity based on the possibility the OCC did not consider certain facts, even though the OCC indisputably "had the full power to actively supervise" – and unlike the Florida PSC, actually made a decision after a hearing.

In sum, the Tenth Circuit has radically rewritten the rules governing intrusion by federal courts into issues affecting competition that the States have expressly entrusted to regulatory agencies. The upshot assuredly is "nothing more than a collateral attack on the OCC's right to supervise, regulate and control matters relating to the

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10 Those presentations painted SWBT's long-term contracts as "coercive," as the product of a "Blitz," and as slowing the advances of potential competitors. The court of appeals was thus demonstrably wrong in asserting that these facts were not "known" to the OCC. (25a).

performance of [public utility] duties and of correcting abuses." (47a) (dissent).

The context of the decision below gives it broad significance. The transition from a statutory monopoly to regulated competition, supervised by state regulatory authorities, is a recurring phenomenon. The grave economic consequences of subjecting a once-exclusive franchisee to antitrust liability for actions taken before competition was authorized may well delay or derail further deregulatory efforts. No less important is the threat that the decision below poses to state sovereignty in regulating the transition to competition.

II. THE DECISION ALLOWING DAMAGES FOR AVOIDABLE FUTURE MISCONDUCT CONFLICTS WITH DECISIONS OF AT LEAST THREE CIRCUITS

The damage award transgresses the most basic principles governing antitrust remedies. It establishes a new rule allowing juries to reward individual competitors with a treble-damages windfall based on a defendant's presumed future misconduct, while failing to protect the competitive process and consumer welfare, even when that could have been readily accomplished by injunctive relief. It conflicts with the law of antitrust remedies in other circuits and with this Court's focus on antitrust as a means of protecting competition and enhancing consumer welfare.

Moreover, the decision below ignores the clear terms of the antitrust statutes themselves. The statutory language – which is the sole source of courts' remedial authority in antitrust cases – allows damage awards only to persons "injured in [their] business or property by reason of" an antitrust violation. 15 U.S.C. § 15(a). In contrast, private plaintiffs may obtain injunctive relief "against threatened loss or damage." 15 U.S.C. § 26. Yet the court of appeals

awarded treble damages for injuries that were no more than "threatened."

The math in this case is straightforward. A maximum of $2.74 million awarded to plaintiffs can be justified as past lost profits. (32a). The remainder of the jury award - $4.75 million, trebled to $14.25 million, plus interest - necessarily represents future lost profits based upon future enforcement of pre-existing contracts. (Id.). An injunction against enforcing the contracts, of course, would have prevented future harm to plaintiffs and would have benefited all payphone competitors. Yet the court of appeals allowed plaintiffs to recover over $14 million without ever competing for the business in a marketplace unfettered by SWBT's allegedly anticompetitive contracts with location owners.

This decision conflicts with decades of antitrust law and remedies jurisprudence. *First*, the court of appeals's ruling conflicts with the decision of the Seventh Circuit holding that antitrust remedies cannot be awarded on the basis of a presumption that the defendant will continue to engage in conduct adjudged to violate the antitrust laws. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 449-50 (7th Cir. 1984). As the dissent recognized, that "assumption is wrong as a matter of law." (47a).

Second, the decision conflicts with decisions in at least two other circuits holding that avoidable damages, arising from unlawful actions yet to occur, cannot support a damage award. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 395-97 (9th Cir. 1957) (plaintiff cannot "recover for anticipated invasions"); *Connecticut Import. Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939) (damages are precluded where illegal acts may not be continued). Indeed, a plaintiff cannot "recover for anticipated invasions, even though they are of the same general character of those he

has already sustained." *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (D. Mass. 1942).

Third, if there is evidence that unlawful conduct will recur, plaintiffs' sole recourse is to injunctive relief. An injunction against anticompetitive conduct affords the benefits of competition not only to the individual plaintiff, but to the public at large and to all competitors in a monopolized market. On the other hand, an award of future profits, trebled, provides plaintiffs with a huge windfall, but does nothing directly to restore competition for the benefit of the public interest.

That is what happened here. Plaintiffs *withdrew* their claim for injunctive relief *after* SWBT filed its motion attacking the jury award as including lost future profits. (SWBT-App. 3553-54). Given a choice, plaintiffs unsurprisingly opted to pocket treble damages now, rather than to enjoin SWBT from enforcing the offending portions of its contracts. An injunction, of course, would have required plaintiffs to try to earn their supposedly lost future profits by competing with SWBT, as well as all other independent payphone providers. Plaintiffs should never have been offered that choice because the jury was not entitled to award future damages.

The court of appeals's concern for "thousands of contracting third-party location owners" who might not "want to terminate their contracts" with SWBT is baseless. (33a). No injunction would have *required* termination. Location owners could simply have been granted the option to do so, if they had a better offer. This would have cured any possible continuing violation, because a contract that is terminable at will cannot, as a matter of law, "lock up the market." *See Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-64 (9th Cir. 1997); *Paddock Publ., Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1997); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 238-39 (1st Cir. 1983).

Similarly, if location owners were bound to SWBT's contracts by virtue of penalties for early termination (3a), these easily could have been enjoined or not enforced.

The extraordinary significance of the court of appeals's error is illustrated by its comment that SWBT did not "indicate that it requested or consented to [a damages-avoiding] injunction either before or after the jury decided the damages issue," and did not provide "*any* assurance" that it would not engage in future misconduct (33-34a) (emphasis in original). The notion that a defendant contesting liability would agree to an injunction prior to the verdict is self-evidently absurd. After the verdict, the idea of a *defendant* requesting an injunction against itself *where the plaintiff does not seek one* transgresses Article III's "case or controversy" requirement. Nor does there exist any mechanism of law that affords relief from a jury's damages award based on defendant's "assurances." The only proper remedy was to limit the damage award to actual injuries from past conduct.

The inability of the court of appeals to identify "relevant authority" or "justification" to support the proposition that "a contract-avoiding injunction forecloses the availability of damages" (34a) demonstrates its misguided approach. The point is that future damages which are avoidable if the defendant ceases further misconduct, or if such acts are enjoined, are not recoverable at all.

III. BY UPHOLDING LIABILITY AND DAMAGES FOR COMPETITOR CONDUCT THAT DID NOT INJURE COMPETITION IN THE CONSUMER MARKET, THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS THAT REQUIRE PROOF OF ANTITRUST INJURY IN THE MARKET WHERE THE PLAINTIFF COMPETES FOR SALES AND CLAIMS DAMAGES

Plaintiffs' only sales were to consumer end-users of payphones, and plaintiffs' only damages were based on alleged losses of such sales. In that consumer market, payphones face powerful competition from cellphones. Accordingly, it was possible for a jury to find that even total control by SWBT of payphone locations would not (because of competition from cellphones) give it monopoly power over consumers. Nonetheless, the court of appeals concluded that "regardless of the interchangeability of pay phones and cell phones at the end-user level," only locations count for market definition purposes (11a). The result was to relieve plaintiffs of the obligation to prove harm to competition in the only market where they suffered damages, even though proof of such harm is an essential element of an antitrust damage claim. *See Brunswick Corp.*, 429 U.S. at 489.

This holding conflicts with decisions in other circuits which establish the elements of liability where competitors complain – as here – that they are "foreclosed" from access to upstream distribution inputs by the contracting practices of defendants. In those cases, foreclosure of access is an antitrust violation because it causes consumer injury, not because it harms access to distribution for its own sake. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 59-64, 69-71 (D.C. Cir. 2000) (defendant's contracts with personal computer manufacturers and internet access providers were exclusionary because they foreclosed competitors' ability to

sell their operating systems downstream to "computer users," where defendant had a monopoly); *Omega*, 127 F.3d at 1163 ("Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of 'substantial foreclosure,' because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market") (quoting *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987)); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("The exclusion of competitors [in exclusive dealing cases] is cause for antitrust concern only if it impairs the health of the competitive process itself"; the "effect of the exclusion [must] be to raise prices above (and therefore reduce output below) the competitive level.").

In the case of monopolization suits brought by competitors, particularly in suits based - as here - on allegedly exclusive contracts, the potential danger is that a monopolist, by raising barriers to entry, will gain the ability to charge supracompetitive prices or restrict output in the ultimate consumer market from which it derives revenue. *See, e.g., AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (monopoly leveraging claim requires a threat of "higher prices or reduced output" in the "second, non-monopolized market"). Thus, the relevant market must be defined as the "area of effective competition" between the defendant and plaintiff, in which they compete for "consumer potential." *Intergraph Corp. v. Intel Corp.* 195 F.3d 1346, 1353 (Fed. Cir. 1999). Here, of course, competition for "consumer potential" occurred only

in the end-user market, where plaintiffs' damages allegedly arose.[11]

This Court has never held that in a monopolization case where the parties compete for sales to consumers, a plaintiff can avoid showing competitive injury to consumers arising from the alleged exclusionary conduct simply by defining the market to consist exclusively of the distribution outlets (*e.g.*, payphone locations) necessary to provide the downstream competition. Rather, the antitrust laws are first and foremost intended to protect consumer welfare. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("consumer welfare prescription"). In a Section 2 context, this means the defendant must have the power to raise prices above, or reduce output below, competitive levels. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464, 481 (1992). Whether such power to harm consumers exists is a threshold factual issue in any monopolization case. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 457-59 (1993). Indeed, where vigorous inter-product competition exists, even if a single supplier controls 100% of the inputs necessary to sell one such product, competition from an interchangeable product can protect consumers from the exercise of market power. *See Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) (control of patent does not matter "if no consumer interest can be discerned ... in a suit brought by a competitor"); *E.I.*

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11 The court of appeals chided petitioner for relying on *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), for the proposition that market definition must be evaluated from the end-user's perspective. (11-12a). According to the court, the "reference to consumers [in duPont] makes perfect sense . . . given that the market at issue [sale of cellophane wrap] indisputably was a consumer market." (12a). This is no distinction at all, however, since the only sales at issue here were also made by the parties to consumers.

Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-306 (10th Cir. 1975) (control over unique product endorsement is significant only if there is market power in consumer market). In such circumstances, there can be no monopolization, no restraint of trade and no antitrust damages in the end-user market. The decision of the Tenth Circuit effectively jettisons all of this authority, and transforms the antitrust laws into a competitor-protection tort. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (antitrust laws do not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce").[12]

Nothing in the monopsony cases cited by the Tenth Circuit justifies this result. Those cases find liability for conspiracies among horizontal competitors to fix the price at which a commodity is bought, or to boycott a supplier. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (horizontal price fixing conspiracy among buyers); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (horizontal conspiracy); *Brown v. ProFootball, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J. dissenting), *aff'd*, 518 U.S. 231 (1996) (same); *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999) (horizontal boycott); *Reazin v. Blue Cross*, 899 F.2d 951 (10th Cir. 1990) (horizontal boycott). These cases thus stand only for the unremarkable

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12 Not only does the decision below conflict with rulings in this Court and other circuits, it conflicts with the views of the expert agency responsible for telecommunications nationwide. As the FCC has repeatedly found, cellphones "are an adequate substitute for payphones for many end users," and "the proliferation of such telephones acts as another constraint on the ability to sustain supracompetitive prices for payphone services." *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20541 n.773 (Sept. 20, 1996).

proposition that a seller victimized by a buyer's cartel in a particular market has the same remedies as a buyer victimized by a seller's cartel. In this case, of course, plaintiffs sell nothing in the input/location market.

The court of appeals brushed aside *Addamax Corp. v. Open Software Foundation Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995), and *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1202 (W.D.N.Y. 1995) as "inadequate to overcome" the pure monopsony, seller-plaintiff cases. (18a). The court failed to recognize, however, that these were not pure monopsony cases. Rather, they involved claims, like plaintiffs' here, that monopsony power was used to handicap plaintiffs seeking to compete for sales in consumer markets. Like the exclusive contract cases, these district courts correctly held (in conflict with the Tenth Circuit) that proof of consumer harm was required in such circumstances.[13]

Finally, the court of appeals's "holding that end-users of phone services do not matter" (38a) (dissent), ignores fundamental limits on the use of summary judgment. As the court of appeals recognized, the jury here was permitted to impose liability and award damages by focusing

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13 The court of appeals lost sight of the fundamental distinction between a plaintiff who is the direct victim of monopsonistic conduct – such as a location owner might be – and the plaintiffs in this case, who suffered no losses in that market. The court thus tore down a strawman when it wrote at length that "suppliers" such as location owners "are protected by antitrust laws even when the anti-competitive activity does not harm end-users." (13a). Rather, the crucial point is that plaintiffs here are not "suppliers." They are SWBT's competitors in the downstream consumer market, where cellphones prevent SWBT from exercising any monopoly power.

exclusively on the consumer market. (5a).[14] No such verdict could properly be sustained, however, given the court's unanimous holding that a jury question was presented as to whether consumers view cellphones and payphones as being reasonably interchangeable. (38a) (dissent) ("there was a factual dispute . . . as to whether Plaintiffs' theory [of the relevant market] was correct"). In straining to excuse this reversible error, the majority applied a disputable legal presumption concerning market definition, thereby improperly resolving an acknowledged factual dispute as a matter of law. *See Kodak*, 504 U.S. at 456, 466-67.

The court of appeals's market definition ruling cannot be reconciled with the decisions of this Court or other circuits. It potentially affects every industry where competitors in end-user markets can claim they are handicapped in obtaining production or distribution inputs necessary to make sales in end-user markets. The ruling thus invites plaintiffs and other courts to abandon the required proof of antitrust injury necessary to recover damages for lost consumer sales.

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14 The district court's summary judgment and *in limine* rulings, as well as its jury instruction, defined the market as the "provision of public payphone service . . .," but did not limit the evidence, counsel's arguments or the jury's deliberations to the location owner point of distribution. Thus, the district court's rulings left the jury free to find consumer injury, where (because of cellphones) there was none, and the plaintiffs were free to contend that SWBT price-gouged its end-user customers without rebuttal based on cellphone competition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 5, 2003

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